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TRUSTS AND MONOPOLIES.

THE ANTI-MONOPOLY ACT: A REVIEW OF THE DECISIONS AFFECTING IT.

The Act of Congress of the 2d July, 1890, in general terms, provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the States, is thereby declared to be illegal: that every one who shall make any such contract or engage in any such combination or conspiracy, shall be guilty of a misdemeanor and punished by fine or imprisonment or both. (2) That every one who shall monopolize or attempt to monopolize, or combine or conspire with any other person to monopolize, any part of the trade or commerce among the States shall be likewise guilty of a misdemeanor. (3) Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce in the Territories and between the Territories and the States or the District of Columbia and the States or foreign nations, is likewise made void, &c. (4) The several circuit courts of the United States are given jurisdiction, and the several district attorneys, under direction of the Attorney-General, shall institute proceedings in equity to prevent and restrain such violations; such proceedings may be by petition praying for injunction, &c. (5) Whenever the ends of justice require it, other parties may be brought before the court whether they reside in the district in which the court is held or not, and subpœnas to that end may be served in any district by the marshal thereof. (6) Any property owned under any contract or combination, or pursuant to any conspiracy, mentioned in section one, and being in the course of transportation from one State to another or to a foreign country, shall be forfeited, and may be seized and condemned by like proceedings as are provided for the forfeiture, seizure and condemnation of property

illegally imported into the United States. (7) Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden by the act may sue therefor in the Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and may recover threefold the damages sustained by him, costs of suit and a reasonable attorney's fee. (8) The word "persons" used in the act shall include "corporations," &c.

Criticism has been made of this statute that it attempted to create and to punish an offence not previously known to the laws of the United States, nor even to the common law except when the act amounted to a conspiracy; that its language was vague and uncertain; that it was mainly a criminal statute and did not provide adequate punishment; that there was no provision for restraining the maintenance and continuation of a trust, but only the entering into agreements in restraint of trade; that monopoly or restraint of trade at common law was too narrow and that the act should have declared that other things constituted monopoly or restraint of trade. Spelling on Trusts and Monopolies, sec. 132.

The act has received judicial construction in several cases in the Circuit Courts of the United States and in one case in the Supreme Court.

U. S. v. Jellico Mountain Coal Company, 46 Fed. 432 (1891) Circuit Court Tennessee: This is probably the first case arising under the statute. It was the case of an agreement between coal mining companies operating chiefly in one State, and dealers in coal in a city in another State, creating an exchange to advance the interests of the coal business, to establish the price of coal and change the same from time to time; there was a bill in equity filed under the fourth section of the act to enjoin, &c. The Court decided that it was a monopoly under the language of the act.

U. S. v. Greenhut, 50 Fed. Rep. 469 (1892) U. S. Dist. Ct. D. Mass.: This was a criminal proceeding under the act against the officers of the Distilling and Cattle Feeding Company (a corporation of the State of Illinois), known as the "Whiskey Trust," and the question in the case turned on a demurrer to the indictment, the court holding that the indictment had not sufficiently charged an offence in the language of the statute. That was all the case decided.

In re Greene, 52 Fed. Rep. 104 (1892), in the West District of Ohio. The "Whiskey Trust": This was a *habeas corpus* proceeding brought by Greene, who had been indicted for violation of the statute, and by the

decision he was discharged. The opinion in the case was that of Judge Jackson, then of the Circuit Court and later Mr. Justice Jackson, of the Supreme Court of the United States, now deceased. He takes the ground that there are no common law offences against the United States; that the Federal courts cannot resort to the common law as a source of criminal jurisdiction; that crimes against the United States are such and only such as are expressly designated by statute, and that Congress must define those crimes; that Congress may adopt common law offences, and when it does so the courts may properly look to that body of jurisprudence for the true meaning and definition of such crimes; that in this case Congress went beyond the common law and made a contract in restraint of trade a misdemeanor, it being such at common law only when the contract assumed the form of a conspiracy in restraint of trade; that the act does not attempt to define what constitutes a contract, combination or conspiracy in restraint of trade, and that therefore recourse must be had to the common law to get at a definition of these general terms and to ascertain whether the acts charged come within the statute.

The facts in this case, as charged in the indictment, were, briefly, that on a specified date, defendants, under the guise of the Distilling and Cattle Feeding Company, sold to certain persons in Boston a quantity of alcohol, then in Illinois; that said Company controlled the manufacture and sale of seventy-five per cent. of all distillery products in the United States; that defendants fixed the price at which the purchasers should and did sell such alcohol, and did compel said purchasers to sell said alcohol at a less price, not less than that fixed by them; that said Company promised persons who purchased from its distributing agents that if, for the ensuing six months, they would purchase their distillery products exclusively from it and would not resell the same at prices less than those fixed by the Company, then, on being furnished with a certificate of compliance therewith, it would pay a certain rebate on the amount of such purchases.

The Court, on p. 113, gives the accepted interpretation of the meaning of the commerce referred to in the interstate clause of the Constitution, viz.: that it "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." Citing *County of Mobile v. Kimball*, 102 U. S. 691; *Gloucester Ferry Company v. Pennsylvania*, 114 U. S. 208, to which may be added *Gibbons v. Ogden*, 9 Wheat. 1. He states that such things are within the *ex-*

clusive regulating power of Congress. And he then states that Congress certainly has not the power under this clause—

"to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control, and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or the products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property which the States of their residence or creation sanction and permit. It is not material that such property, or the products thereof, may become the subject of trade or commerce among the several States or with foreign nations."

This qualification placed by the Judge upon the power of Congress, it is respectfully suggested, is not justified considering the interpretation given by the Supreme Court to the interstate commerce clause as just quoted, for it is there stated to include "the purchase, sale and exchange of commodities." And the judge himself goes on to state that it is settled by the decisions of the Supreme Court that it "includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one State to another." If such is the power of Congress, why is it that it has no jurisdiction over the purposes and intentions of persons in the acquisition and control of property destined for trade or commerce among the States? He further states that it is settled—

"That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or *situs* to some other State or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of property in the State of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State. At that time the power and regulating authority of the State ceases, and that of Congress attaches and continues, until it has reached another State, and becomes mingled with the general mass of property in the latter State. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade or traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling and the merging thereof in the general mass of

property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce." Citing: *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. Rep. 1091; *Coe v. Errol*, 116 U. S. 517–520, 6 Sup. Ct. Rep. 475; *Robbins v. Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. Rep. 592; and *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6.

It must be realized that if this is a proper qualification upon the definition as given of the commerce referred to in the interstate clause, the words "purchase, sale and exchange of commodities" might as well have been left out of the definition unless they were meant to apply to articles only while they are actually *in transitu*. The Judge then concludes:

"It is very certain that Congress could not, and did not, by this enactment attempt to prescribe limits to the acquisition, either by the private citizen or State corporation, of property which might become the subject of interstate commerce, or declare that, when the accumulation or control of property by legitimate means and lawful methods reached such magnitude or proportions as enabled the owner or owners to control the traffic therein, or any part thereof, among the States, a criminal offense was committed by such owner or owners. All persons individually or in corporate organizations carrying on business avocations and enterprises involving the purchase, sale or exchange of articles, or the production and manufacture of commodities which form the subjects of commerce will, in a popular sense, monopolize both State and interstate traffic in such articles or commodities just in proportion as the owner's business is increased, enlarged and developed. But the magnitude of a party's business, production or manufacture, with the incidental and indirect powers thereby acquired, and with the purpose of regulating prices and controlling interstate traffic in the articles or commodities forming the subject of such business, production or manufacture, is not the monopoly or attempt to monopolize which the statute condemns."

He then proceeds to show that the word "monopoly" in the prohibited sense involves two ideas, viz.:

"An exclusive right or privilege, on the one side, and a restriction and restraint on the other, which will operate to prevent the exercise of a right or liberty open to the public before the monopoly was secured."

The Judge then reasons out that the form of the contract, the rebate clause under which the accused sold their goods, did not impose any restriction upon those who bought them; that it was purely unilateral, and that there was no restraint of trade or monopoly in the case.

U. S. v. Nelson, 52 Fed. Rep. 646 (1892), U. S. Dist. Ct., Minnesota. The "Lumber Trust:" Defendants in this case were indicted for a violation of the act. The charge was, in substance, that the defendants were each dealers in lumber in the United States; that each transacted business in the different States, and that on September

7th, at the City of Minneapolis, they agreed together that they would advance the price of lumber fifty cents a thousand feet in each of the said States in which they transacted business, viz., Wisconsin, Minnesota, Iowa, Illinois and Missouri, and in pursuance of such agreement they did then and there raise the price of pine lumber fifty cents in each of said States.

A demurrer to the indictment was sustained.

On page 647 the Judge says:

"It appears that the idea of the pleader was that a mutual agreement between several dealers that they would raise the price of lumber owned or manufactured by themselves fifty cents per thousand feet above the market price necessarily advanced the price of all of the pine lumber for sale in those States to that extent, and none could be purchased for a less price. While it may be true that some of the other dealers might attempt to induce purchasers to be governed by the price fixed in their locality by the parties to the agreement, and try to keep up prices, yet competition in the commodity would soon bring the price down, unless there were fraudulent or coercive means resorted to for the purpose of restraining other dealers and preventing them from exercising their own judgment as to prices.

"An agreement between a number of dealers and manufacturers to raise prices, unless they practically controlled the entire commodity, cannot operate as a restraint upon trade, nor does it tend to injuriously affect the public. Unless the agreement involves an absorption of the entire traffic in lumber, and is entered into for the purpose of obtaining the entire control of it with the object of extortion, it is not objectionable to the statute, in my opinion."

It would seem that this opinion was open to this criticism, to-wit: that the indictment contained the averment that the arrangement entered into between the defendants had actually raised the price of lumber; if it had raised the price, then it was a combination injurious to the public, although the effect was brought about by a proportion of the lumber dealers short of the entire number engaged in the business, and although the price might subsequently be brought down by the competition of those not in the combine.

U. S. v. Trans-Missouri Freight Association, 53 Fed. 440: This case decides that it was not the intention of Congress to include common carriers, subject to the act of February 4, 1887, in the provisions of the act of July 2, 1890.

U. S. v. Workingmen's Amalgamated Council, of New Orleans, 54 Fed. 994, 1893: A combination of men to secure the employment of none but union men becomes a combination in restraint of interstate commerce, within the meaning of the statute, when, in order to gain its ends, it seeks to enforce, by violence and intimidation, a discontinu-

ance of labor in all departments of business, including the transportation of goods from State to State.

Waterhouse v. Comer, 55 Fed. 149, Circuit Court Western Dist. Georgia, 1893: Decides that the rule of an association of locomotive engineers, styled the "Brotherhood of Locomotive Engineers," imposing restrictions upon employment, &c., is plainly a rule or agreement in restraint of trade or commerce under the provisions of the act.

THE ACT IN THE SUPREME COURT.

The last and the only case in which the act has been passed upon is by a court of last resort, viz.: *United States v. E. C. Knight Co.*, 156 U. S. 1 (January 21, 1895). This is the first case bringing the act before the Supreme Court, and it may be presumed that the court's action upon it has been of very general interest. It is the case of the "Sugar Trust," coming from the Circuit Court for the Eastern District of Pennsylvania. A bill was filed under the fourth section of the act by the United States against the defendants therein named charging that they had violated the provisions of the act; that the defendant, the American Sugar Refining Company, was incorporated under the laws of New Jersey for the purpose of manufacturing, refining and selling sugar, and owned the entire trade in that business in the United States except the E. C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company and the Delaware Sugar House, all at Philpdelphia, and the Revere Company at Boston; that these latter companies (except the Revere), which were likewise defendants, were incorporated to manufacture, sell, refine, import and otherwise deal in sugar, and their product was distributed through the several States of the Union; that the American Sugar Refining Company, in order to obtain complete control of the price of sugar in the United States, entered into an unlawful scheme to purchase the stock, outfit and real estate of the other four companies named, by which it attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other States as it had been theretofore carried on independently by those companies; that, in pursuance of this scheme, the American Sugar Refining Company, on or about March 4, 1892, purchased of said four companies all their issue of stock, giving for the same the stock of the American Sugar Refining Company; that the American Sugar Refining Company monopolized the sale and manufacture of refined sugar in the United States, and in making these contracts combined with the other defendants to restrain trade and commerce

in sugar among the several States; that the object was to increase the regular price at which refined sugar was sold, and thereby to exact large sums of money from citizens of Pennsylvania and of other States as purchasers. These, in brief, were the charges of the bill and the facts of the case. Answers were filed and depositions taken, and it was proved, in addition, that each of the purchases was made subject to the American Sugar Refining Company's obtaining authority to increase its stock $25,000,000, which was subsequently done; that there was no understanding or concert of action between the stockholders of the several Philadelphia concerns respecting the sales, each acting in ignorance of the other; that the contracts of sale in each instance left the sellers free to establish other refineries and continue the business if they desired, and contained no provision respecting trade or commerce in sugar; that the price of sugar had been slightly advanced since that event, but was still lower than it had been for some years before; that about ten per cent. of the sugar refined and sold in the United States is refined in other refineries than those controlled by the American Sugar Refining Company; that the object in purchasing the Philadelphia refineries was to obtain a greater influence or control over the business of refining and selling sugar in this country.

The Circuit Court rendered a decree dismissing the bill, and its decree was affirmed in the Circuit Court of Appeals and in the Supreme Court.

Mr. Chief Justice Fuller delivered the opinion of the court. Mr. Justice Harlan dissented.

The Chief Justice, in the first place, makes reference to the meaning of the word "monopoly" at common law, and to the larger significance given to it in modern times, whereby it is not confined to a grant or commission from the king (or other power) to a person of or for the sole buying, selling, making, working or using of anything, whereby any one is sought to be restrained of any freedom he had before, or is hindered in his lawful trade, but is applied as well to agreements among individuals whereby the same results may be accomplished. The Court then takes it as a concessum that the existence of a monopoly in manufacture is established by the evidence, but says the fundamental question is whether it can be supprssed under the act of Congress. And this question it proceeds to decide in the negative, on the ground that the United States Government has no jurisdiction in the case; says it is a question of manufacture and not of commerce; that manufacture, along with agriculture, mining and other similar industrial pursuits,

belongs to the jurisdiction of the States, while commerce between the States belongs to the jurisdiction of the United States—each having its own peculiar jurisdiction and each being exclusive of the other; that if the law of the State comes into the province occupied by the jurisdiction of the United States, the State must yield, because the United States is declared to be supreme. The Court, on page 12, says:

"The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the General Government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce."

And then after proclaiming the importance of observing the delimitation between the commercial power of the United States and the police power of the States, the Court says, on page 13:

"Contracts to buy, sell or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce."

In support of this proposition the Court refers to the case of *Coe v. Errol*, 116 U. S. 517, in which it was held that logs cut in New Hampshire and hauled to a town in the State for ultimate transportation to Maine were subject to taxation by the State of New Hampshire, and to the case of *Kidd v. Pearson*, 128 U. S. 1, in which it was held that a State had the right to pass a law forbidding the manufacture of liquor in the State, although such liquor was intended for transportation to another State, upon the ground that it did not directly affect external commerce. Upon these two cases, mainly, the Court seems to rest its

decision of the case, as shown by the following extract from the opinion on pages 16, 17:

"All the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control.

"It was in the light of well-settled principles that the Act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the Companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize or the actual monopoly of the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree."

The opinion was evidently inspired by loyalty to the doctrine of State Sovereignty, but without detriment to it the Court might have decided otherwise. While the Court does not declare the act of July 2, 1890, unconstitutional, its decision in declining to take jurisdiction, by means of the commerce clause of the Constitution, over monopolies injuriously affecting the subject-matter of commerce between the States is well-nigh as

potent as its decision, at a later day, declaring unconstitutional the income tax act. It will remain for the unfolding of events in the future to determine whether the soundness of this decision will be accepted. In the meantime, it is submitted, with deference, that some of the reasoning of the Court is exceedingly refined and that some of its distinctions are very shadowy. Thus, take what is said on p. 17 (embraced in the paragraph last quoted):

"... what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce."

Now, it seems to the writer that for this august tribunal to proclaim solemnly that what the "Sugar Trust" was after in the purchase of the Philadelphia refineries was exclusively to *acquire* them and to *refine* sugar in Pennsylvania, and had no reference whatever to commerce between the States; to proclaim that its object was manifestly private gain in the *manufacture* of the commodity and not the control of interstate commerce in the commodity, is for the Court to see the case in a light that nobody else sees it.

How does this view taken by the Court of the intention of the "Trust" compare with the reporter's statement of the material facts proved in the case; among the facts proved, on p. 6, he says:

"The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."

This shows what was proven in the case to have been the object of the "Trust"; and it was needless to have proven it, because, to the mind of ordinary intelligence, such a result was the inevitable consequence of the action taken. Besides, its object could not have been merely the refining of sugar in Pennsylvania, because, while in this case the four refineries purchased continued in the business, it is a part of the public history of the couutry that the "Trust" has bought out refineries and, for want of use, at once closed them up. The Court proceeds:

"It is true that the bill alleged" (and they might have added, it was proven in the case,) "that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce

with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function"!

Now, this language must proceed on the theory that the American Sugar Refining Company was a manufacturer pure and simple, and nothing else, and that the Philadelphia refineries were manufacturers pure and simple, and nothing else; the facts, as they appear in the record, are that all these companies were refiners and dealers; that they bought and they sold; that they had conferred upon them, in their very charters, the power of buying and of selling; and, some of them, of importing. Now, if a person, whether natural or artificial, is engaged in buying and selling in a territory extending over two or more States and of transporting the goods bought and sold from State to State, by the definition of the commerce clause as repeatedly given by the Supreme Court, he is engaged in commerce between the States, and he is subject to the laws of Congress regulating the same. Is such an one any the less engaged in commerce because a portion or a branch of his business is the refining of the crude material of the article in which he deals? Is not the business of a refiner, situated at Philadelphia, essentially the purchasing of the raw material from the producer in distant States where the cane is grown and the raw meterial made; the transportation thence to Philadelphia of the same; the manipulation of the material so purchased and transported, and then the disposal of the article, by sale, to consumers situated the country over, and its transportation thence to them? If that is his avocation, it is difficult to see how he should be exempted from laws enacted by Congress to regulate interstate commerce, when it may be taken as conceded (from language used at large in the opinion) that he would be subject to such laws if he were merely a merchant who bought the raw material, transported it to Philadelphia and sold it to the refiner and then bought from the refiner his product and sold it to consumers throughout the country; in other words, if he were a dealer, pure and simple.

This "transformation of materials," as manufacture is judicially described to be, becomes, in very truth, a shield of protection to the monopolist. If he ply his vocation, let it be with cruel inhumanity, and the law arrest him, all he need do is to draw forth this passport and go ahead. Verily, this "transformation of materials" is an Aaron's rod that swallows up all other rods! And, not irreverently, to paraphrase the language of the Court, it may be said that "manufacture serves the monopolist to fulfil his function."

The Court, after stating that the sugar was refined for sale; that it was sold and resold throughout Pennsylvania and other States and forwarded by the companies to other States for sale there, says:

"Nevertheless, it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

This might provoke a suggestion that the good old rule of law which says that a man is presumed to intend the natural consequences of his act is ancient history.

These extracts from the opinion have prepared its explorer for the consummation:

"There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle the complainants to a decree."

No, nothing!

It is a pity, then, that the Court should have allowed the reporter of the case to state that the object of the purchase was to obtain a more perfect control over the refining *and selling* of sugar in this country was among the facts proved. If the business of selling sugar in this country (an article of food that, it may literally be said, finds its way to the mouth of every man, woman and child of all the millions that inhabit the several States of the Union) is not interstate commerce, then it is hard to conceive what selling, bartering or purchasing should properly come under the jurisdiction of the commerce clause of the Constitution.

Monopoly in the manufacture was conceded by the Court to have been established, but they say there was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce.

To state analytically the successive stages evolved from the transaction, it may be said that it will be admitted by all men that the primary object of all five of the corporations was gain, and that the buying, the transporting, the refining and the selling were secondary to this main object; each of the five corporations prior to the 4th of March, 1892, with the object of its own gain in view, bought, transported, refined and sold, singly; each, prior to that day, was a competitor of the other; on that day they pooled their issues with the primary object of gain in view. Now, will it do to say that in that transaction refining was their main object? And that the other em-

ployments were secondary and incidental to it? Is it not, the rather, logical to say that, in the accomplishment of the main object of gain, the successive employments—buying, transporting, refining and selling—were all co-ordinate functions of the common end, the one as essential and important as the other. If that is admitted, it is impossible to conceive a monopoly in the one that does not apply to the others, and apply as much to any one of the employments as to any other of them. But it is admitted that the jurisdiction extends to purchase, transportation and sale.

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, *as well as* the purchase, sale and exchange of commodities. ' The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." *Gloucester Ferry Company v. Pennsylvania, supra.*

The jurisdiction of Congress, then, extended to purchasing, transporting and selling between the States; its statute made a monopoly, or combination in restraint of trade, in those three things unlawful. The defendants in this case were proven guilty of a combination in restraint of trade in those three things; but, inasmuch as the proofs showed likewise that they were engaged in refining, as to which Congress had no jurisdiction, and a monopoly in which it therefore could not and did not make unlawful, they were let off because refining was lawful. Any man may lawfully load a gun. If he then shoot some one with that loaded gun he can't be convicted of an offence, because it was lawful for him to load his gun!

This sweeping consequence of the decision is evident and should be realized, viz.: that it will protect from the aim of the act every monopoly of any consequence in this country, for every one of them is a manufacturer as well as a dealer; and, in the nature of things, the mind cannot conceive of a monopoly in an article that is ubiquitous and lasting, unless it controls the manufacture of that article.

If respect for the sovereignty of the States be responsible to the people of this country for this decision, the school with which that doctrine is a favorite may well ponder if, under the exigencies of the period that grow out of the thraldom already established over so many industrial pursuits and the greed which threatens others, the States, after all, are not powerless to insure to the citizen protection in the

enjoyment and use of his property. Mr. Justice Harlan, dissenting from the Court, will be found to be in accord with many when he says:

... "the preservation of the just authority of the General Government is essential as well to the safety of the States as to the attainment of the important ends for which that Government was ordained by the people of the United States; and the destruction of *that* authority would be fatal to the peace and well-being of the American people. The Constitution which enumerates the powers committed to the nation for objects of interest to the people of all the States should not, therefore, be subjected to an interpretation so rigid, technical, and narrow, that those objects cannot be accomplished."

In speaking of the object for which the stupendous combination was formed in this case, he eloquently, if pathetically, says:

"If this combination, so far as its operations necessarily or indirectly affect interstate commerce, cannot be restrained or suppressed under some power granted to Congress it will be cause for regret that the patriotic statesmen who framed the Constitution did not foresee the necessity of investing the National Government with power to deal with gigantic monopolies holding in their grasp, and injuriously controlling, in their own interest, the entire trade *among the States* in food products that are essential to the comfort of every household in the land."

The Judge, after reviewing the cases reported from the State courts, where there is great unanimity in condemning monopolies, recognizes the inadequacy of those courts to deal with the subject. On p. 33, he says:

"Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a Government which, this Court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch v. Maryland*, 4 Wheat. 316, 405."

On page 40, in this dissenting opinion, is thrown out a hint that points to the only hope for a control of combinations by the General Government, consistent with this decision. It is under the 6th clause of the act providing for the forfeiture, if caught *in transitu* from State to State, of any goods owned by a trust or combination. It is presumed that there could be no objection to jurisdiction over goods in actual transportation. That would be entirely consistent with the decision in this case. But it would seem that Congress might properly pass additional legislation to make that clause of the act more effective. If trusts are to be controlled it must be through the General Government. Their operations apply to every individual in every State, and it would

be just as impracticable for the States to deal with them as with the currency of the country or the duties on imports. The history of the events which led to the transition of the Colonies of this country into States and to the adoption of our Constitution teaches us that commerce between the States and with foreign nations was the main cause which led to the attainment of that result.

It would be to leave an incomplete idea of Mr. Justice Harlan's dissenting opinion if there was omitted the following passage:

"A decree recognizing the freedom of commercial intercourse as embracing the right to buy goods to be transported from one State to another, without buyers being burdened by unlawful restraints imposed by combinations of corporations or individuals, so far from disturbing or endangering, would tend to preserve the autonomy of the States, and protect the people of all the States against dangers so portentous as to excite apprehension for the safety of our liberties. If this be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the States, may pass under the absolute control of overshadowing combinations having financial resources without limit and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness—so powerful that no single State is able to overthrow them and give the required protection to the whole country—and so all-pervading that they threaten the integrity of our institutions.

"We have before us the case of a combination which absolutely controls, or may, at its discretion, control the price of all refined sugar in this country. Suppose another *combination*, organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another, of all the grain elevators; another, of all the oil territory; another, of all the salt-producing regions; another, of all the cotton mills; and another, of all the great establishments for slaughtering animals, and the preparation of meats. What power is competent to protect the people of the United States against such dangers except a national power—one that is capable of exerting its sovereign authority throughout every part of the territory and over all the people of the nation?"

Coe v. Erroll and *Kidd v. Pearson* are correct decisions, and true expositions of the sovereign control each State exercises over its internal affairs. In the former it was questioned whether the State could tax personal property produced in the State and collected together at a point in the State for storage and keeping, though destined ultimately for transshipment to another State. It was decided that it could. That traffic between the States in that personal property had not then begun. Suppose New Hampshire had passed a law that whoever cut logs in that State for transshipment to Maine should pay a license tax of so much money; and, in default of payment, the logs so cut should be

forfeited to the State; and suppose a man had cut those logs and collected them at Erroll, storing them there, intending ultimately to ship them to Maine, and while there the State had seized them. Is it not seen at once that a different case would be made out, and that in the latter instance the issue made up would come immediately under the commerce clause? And that the decision of the court would be the opposite of what it was? Evidently so, because in the latter instance the State statute imposing the tax would intrench upon the jurisdiction of Congress, while the other one did not.

So, in *Kidd v. Pearson:* The State of Iowa said no one should make any liquor in the State except for a certain purpose. Kidd said: I'm going to make liquor, and the State can't stop me, because I am making it for sale in other States; and, therefore, I'm engaged in commerce between the States and subject, in my distillery operations, only to the laws of Congress. The court did not sustain him in his position. It held that the State laws which forbade his operations applied only to his *making* of the liquor; that they did not affect the question of *export,* and because he might design the liquor to be made by him for export after it was made did not thereby transpose him and his operations to the domain of United States jurisdiction. The Court, on p. 22, say:

"We find no provisions in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the State over persons or property or transactions within the limits of other States, or to act upon intoxicating liquors *as* exports, or while they are in process of exportation or importation. Its avowed object is to prevent, not the carrying of intoxicating liquors *out* of the State, but to prevent their manufacture, except for specified purposes, *within* the State."

In the E. C. Knight Company case the issues were certainly more comprehensive and far-reaching. The operations sought to be suppressed embraced, not making alone, but buying, selling and transporting, and what was said by the Court, as above quoted, in *Kidd v. Pearson,* could certainly not be said of this case.

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